Filed 7/22/20 Gossage v. Miles CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CHARLES R. GOSSAGE, Plaintiff and Respondent, v. PATRICK MILES, Defendant and Appellant.	D075001 (Super. Ct. No. 37-2018-00022181-CU-HR-NC)

APPEAL from a judgment of the Superior Court of San Diego County, Michael D. Washington, Judge. Affirmed.

Finch, Thornton & Baird, P. Randolph Finch Jr. and Jason R. Thornton for Plaintiff and Respondent.

Randy K. Jones, Evan Sean Nadel, Antony Nash and Heather J. Silver for Defendant and Appellant.

Appellate judges and practitioners often speak about the importance of the standard of review on appeal. This is because the standard of review defines the relationship between the appellate court and the trial judge whose decision it is reviewing, and it does so by specifying the extent to which the appellate court will defer to the trial court's conclusions. (See generally *Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019,

1023–1025.) By providing the foundational framework, the applicable standard of review affects virtually every appellate case in subtle ways, even if it is never expressly mentioned in the opinion. Occasionally, when it impacts the appellate decision directly, it can be dispositive.

This is one of those latter instances. Following a full-day evidentiary hearing, the trial court issued a year-long civil harassment restraining order (CHRO) against one of two contestants in a property-dispute-turned-ugly between neighbors. As is true in many neighbor conflicts, the trial court in this case believed there was blame to be shared for the escalation of tensions in a previously quiet cul-de-sac. It nonetheless found that defendant Patrick Miles's physical assault on plaintiff Charles Gossage crossed the line and justified issuance of the restraining order.[1]

The fact that Patrick assaulted Charles is not seriously disputed. Instead, Patrick seeks to parse the oral comments made by the trial judge in explaining his decision, disputing what factual findings were actually made and whether the comments reflect legal error. But having reviewed the record including the trial court's comments, we find no support for Patrick's suggestion that the trial court did not appreciate the applicable legal rules. To the contrary, although we are required to presume that the court knew the law, here the court's comments affirmatively reflect its understanding that a single violent incident, by itself, was not enough to support issuance of a CHRO. That the court nonetheless found a restraining order necessary and appropriate demonstrates, if only by necessary implication, the additional finding that there was a likelihood of future harm.

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1 Because other family members are involved, we will refer to individuals by their first rather than last names, intending no disrespect.

What remains, quite simply, is a sufficiency-of-the-evidence question, one as to which we accord the trial court substantial deference. And with good reason. The trial judge in this case observed first-hand the testimony of the parties and other witnesses. He questioned witnesses where appropriate. He reviewed video evidence. Because there is more than adequate evidence to support the court's explicit and implicit findings, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The Gossage family and the Miles family are next door neighbors in Rancho Santa Fe. When the Gossages moved into their home in 2017, the Mileses had been residents of their property for roughly five years. Both homes were accessed from the same private road. The road was part of the Gossage property, over which the Miles (and one other neighbor) possessed an easement.

Disputes regarding appropriate use of the easement led to the Gossages filing a lawsuit against the Mileses and the other neighbor in November 2017. The Mileses responded with a cross-complaint. The Gossage-Miles conflict escalated over the next six months in a series of incidents involving fence posts, parked vehicles, a secondary access to the Miles property, alleged trespassing, written and verbal threats, and one physical altercation between Patrick and Charles.[2]

The critical events took place on May 3, 2018. The parties—Charles, Patrick and their respective spouses, Candyce Miles and Kristin Gossage—agreed to meet that afternoon outside their homes in the cul-de-sac to discuss

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[2] The parties' general allegations are provided for context. The specific facts are stated in the light most favorable to the judgment. The Mileses offered no witness testimony at the restraining order hearing. Their allegations are based on declarations that members of the family submitted in response to the Gossages' request for a CHRO.

resolving the easement dispute. Also present were surveyors for the parties and the Mileses' lawyer Jason Satterly. The meeting was cordial until Patrick arrived. As Charles was talking to the Mileses' surveyors, Patrick screamed at Charles, "You know, you talk too much. You need to shut up." He then pointed his finger at Kristin and yelled, "You be quiet." Charles responded, "You can't talk to my wife that way. Don't yell at her." Patrick, then about 25 feet away from Charles, starting charging toward him until Satterly intervened. As he was being restrained, Patrick pointed at Charles and said, "You don't know what I want to do to you, big boy."[3]

Later that same evening, the Gossages were walking their dog and taking some pictures when they were confronted by the Miles family, including Patrick, Candyce, their adult daughter and teenage son.[4] The Mileses claimed the Gossages were on their property—a claim the Gossages vehemently denied—and demanded that they leave. During the course of a profanity-laced tirade, Patrick pushed Charles several times. The Sheriff's

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[3] During closing argument, the trial judge observed that Patrick was considerably smaller in stature than Charles.

[4] Kristin Gossage made a video recording of the altercation on her cell phone that was played during the hearing.

department was called and Patrick was cited.[5] Charles then sought a CHRO on behalf of himself and his family.[6]

Charles and Kristin Gossage testified at the hearing, along with their surveyor who watched the afternoon prequel to the evening main event. During the hearing, Charles indicated that he and his family had temporarily moved from their residence as a result of the dispute with the Miles family. The Mileses did not personally appear at the hearing and offered no testimony. Neither did their counsel deny that Patrick physically assaulted Charles on May 3. Instead, he focused on his contention that there was no need for a restraining order because there was no credible threat of any future violence.

The trial court disagreed. After declining to issue any order restraining Candyce or Jack Miles the court addressed what it considered to be a "different case" with regard to Patrick because "he is the one that is the most volatile in this court's view. He is the one that is willing, despite his relatively smaller stature, to be physically confrontational." The judge acknowledged what was effectively undisputed—that Patrick unnecessarily pushed Charles. He expressly found "there is [nothing] about Mr. Gossage's behavior . . . that suggested that Mr. Miles was entitled to use physical force." But he recognized that the law required something more. Addressing Charles, the judge explained, "I have to ask—the law requires me to find out

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5 Patrick's counsel represented that charges against Patrick were ultimately dismissed because the citing officers did not appear.

6 Patrick's response to the CHRO request tacitly admitted the assault. His declaration stated, "I am not proud that I resorted to physicality to get the Gossages off my property but was desperate to protect my property rights. I have learned from this experience and am sorry that I allowed myself to be bullied to the point of losing my temper."

whether absent me granting a more permanent order, there is a risk that you won't be protected, that somehow you will still be in danger." Ultimately the court concluded that the continuing risk of violence required issuance of the restraining order: "[B]ecause of Mr. Miles's behavior based on his inability to control his temper, I believe that the only thing that can try to control him is to issue a protective order protecting the Gossages from Mr. Patrick Miles, and I will issue that order at this time."

DISCUSSION

The parties agree that the applicable standard of review in a case of this nature is properly summarized in *R.D. v. P.M.* (2011) 202 Cal.App.4th 181: "The appropriate test on appeal is whether the findings (express and implied) that support the trial court's entry of the restraining order are justified by substantial evidence in the record." "But whether the facts, when construed most favorably in [respondent's] favor, are legally sufficient to constitute civil harassment . . . [is a] question[] of law subject to de novo review." (*Id.* at p. 188.)

The fact that the standard can be stated succinctly does not preclude disputes as to how it is to be applied. Understanding the difficulty in prosecuting a successful appeal where the substantial evidence standard applies, Patrick argues that this case is really about legal error. Characterizing certain comments made by the trial court as factual findings and invoking the rule that such findings are entitled to deference, he contends the court misapplied the law in light of the factual findings.

The issuance of CHROs is governed by Code of Civil Procedure section 527.6.[7] Subdivision (a) of the statute authorizes the court to issue both temporary and permanent restraining orders to "[a] person who has suffered

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7 All statutory references are to the Code of Civil Procedure.

harassment." " 'Harassment' " is defined in subdivision (b) to include three different types of conduct: (1) "unlawful violence"; (2) "a credible threat of violence"; or (3) "a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose."[8] And because a restraining order is a form of prohibitory injunction, case law makes clear that in addition to establishing one or more acts of harassment, the petitioner must also show a high probability of future harm. (*Russell v. Douvan* (2003) 112 Cal.App.4th 399, 401 (*Russell*); *R.D. v. P.M., supra,* 202 Cal.App.4th at p. 189.)

In this case, Charles argued that Patrick engaged in conduct falling within each of the three categories. But to resolve this appeal, we need only focus on the first. We conclude the trial court properly found both that Patrick engaged in "unlawful violence" and that there was a sufficient likelihood of future harm to support issuance of the CHRO.

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8 As to the third prong, the statute also requires the court to find that "[t]he course of conduct must be that which would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the petitioner." (§ 527.6, subd. (b)(3).) For the first time at oral argument, Patrick's counsel pursued a strained interpretation of the statute in suggesting that all three prongs require a finding that the victim suffered substantial emotional distress. "We do not consider arguments that are raised for the first time at oral argument." (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1554, fn. 9.) Moreover, the suggestion is patently incorrect. The term "course of conduct" appears only in reference to the third prong.

1. *There was substantial evidence that Patrick engaged in "unlawful violence."*

For purposes of this appeal, Patrick does not seriously contest that his May 3 physical assault on Charles amounted to "unlawful violence" within the meaning of section 527.6. It is true that his opening brief makes the seemingly contrary assertion that "there is no evidence in the record to support a finding of 'unlawful violence' under Section 527.6, or even the suggestion that [Patrick] ever touched, much less attacked or battered, [Charles]." But Patrick apparently abandons this claim in the reply brief, which focuses exclusively on the contention that the court found there was no likelihood of future harm because the Gossages did not fear Patrick The assertion itself is surprising—Patrick offered no testimony at trial to dispute that he pushed Charles on May 3; his declaration in response to the CHRO request admitted that he "resorted to physicality"; and the event was captured on video that the trial court reviewed. The only argument in this regard made by Patrick's counsel at the hearing was that Patrick's admitted use of physical force was somehow justified because the Gossages were trespassing on his property But the court expressly found to the contrary—that Patrick's use of force was not justified—and he does not challenge that finding on appeal.

Patrick's lack-of-evidence argument appears to be based on his assertion that "[t]he video was not offered into evidence, nor did the Court admit it into evidence." We read the appellate record differently. While the clerk's record could no doubt be clearer, what is certain is that two video segments shot by Kristin Gossage on the evening of May 3 were played during the hearing, repeatedly referenced by the parties (including counsel for Patrick)and considered by the court. Furthermore, the July 16, 2018

minute order reflects that "[p]hotos and videos" were "identified and admitted." Indeed, in response to Charles's question at the conclusion of witness testimony, the court expressly stated there was no need for a formal motion to admit the exhibits, necessarily implying that the referenced exhibits had been received. Finally, even if the May 3 videos were not formally admitted, the witness testimony describing the incident that accompanied the playing of the videos provides more than substantial evidence that Patrick pushed Charles.

2. *There was substantial evidence of potential future harm.*

Patrick's primary argument, both in the trial court and on appeal, is that Charles failed to establish any risk of future harm. On one hand, he faults the trial court for failing to make an express finding that " 'future harm [was] highly probable.' " At the same time, he maintains that Charles "admitted" and the trial court "found" *no* likelihood of future violence. In this regard he relies heavily on some preliminary observations by the trial judge at the conclusion of counsel's closing arguments. These comments, addressed to all the parties, expressed surprise that "nobody in this case behaves like they are afraid." Patrick construes this as a factual finding that neither Charles nor other members of the Gossage family feared future violence. By extension he asserts if the Gossages felt no fear, then clearly no reasonable person would have feared that Patrick would repeat any physically assaultive conduct.

As we have already noted, a finding that plaintiff was harassed by defendant within the meaning of section 527.6 does not mean that a CHRO automatically issues. (*Russell*, *supra*, 112 Cal.App.4th at p. 401; *Harris v. Stampolis* (2016) 248 Cal.App.4th 484, 499 (*Harris*).) Because a CHRO is a form of prohibitory injunction, the usual rules regarding injunctions apply,

and this requires an additional finding by the court that issuance of an injunction is necessary to prevent some form of future harm. (See generally *Scripps Health v. Marin* (1999) 72 Cal.App.4th 324, 332–333 (*Scripps*).) In the case of a CHRO, it means the court must conclude there is a substantial likelihood of future harassment. (*Harris,* at p. 499.)

In *Russell, supra,* 112 Cal.App.4th 399, the plaintiff and defendant were lawyers representing opposing parties in a dispute. By the time of the hearing on the CHRO request, the plaintiff was no longer representing the client in that case. The evidence showed a single instance of battery by the defendant against the plaintiff. Interpreting section 527.6, subdivision (b), the trial court believed " 'if there's a battery or an assault committed and that's demonstrated by clear and convincing evidence, and that's it, that I am supposed to issue an injunction.' " (*Russell*, at p. 401.) But according to the Court of Appeal, this amounted to a misinterpretation of the statute. (*Ibid.*) In addition to a prohibited act or acts of harassment, the trial court was also required to find a probability of future harm. (*Id.* at p. 404.)

Patrick's creative reading of the case law and trial record fails on multiple levels. To begin with, although a risk of future harm is a necessary predicate to issuance of a CHRO, there is no requirement that the trial court make an express finding on the probability that the responding party will reoffend. Patrick cites *Russell, supra,* 112 Cal.App.4th 399 in support of his argument, but the facts of *Russell* are readily distinguishable. Indeed, as explained in *Harris, supra,* 248 Cal.App.4th 484, the trial court in *Russell* "express[ed] an erroneous belief that it *needed* to issue an injunction once a single act of harassment [wa]s established." (*Harris*, at p. 499.) This amounted to legal error—a misinterpretation of the relevant statute. In contrast, the situation both here and in *Harris* is very different. As the

Harris court summarized, "Absent indication to the contrary, we must presume that the trial court followed the applicable law and understood that it was required to find that future harm was reasonably probable. [Citations.] Given that it issued an injunction, we may infer that the trial court impliedly found that it was reasonably probable that future harassment would occur." (*Id.* at pp. 500–501.)

And in this case, not only is there no "indication to the contrary"; rather, the record provides affirmative proof that the trial court understood and applied the proper legal standard. After discussing Patrick's actions and explaining that he "doesn't have the right to do the things that he did," the judge added, "That is not the issue here." Rather, the court said it must additionally determine by clear and convincing evidence that "absent me granting a more permanent order, there is a risk that you won't be protected, that somehow *you will still be in danger*." (Italics added.) It went on to conclude that issuance of a restraining order was the only effective means of controlling Patrick's behavior and protecting the Gossages. That the Gossages needed protection from the threat of future violence was necessarily implied. No more explicit finding was required.

The evidence fully supports the trial court's conclusion. Even if the court focused on a single incident of physical violence that occurred on May 3, it commented on the abundant evidence demonstrating that Patrick had an explosive temper. The testimony of three witnesses suggested that earlier that same day (May 3), physical violence would have occurred but for the intervention of Patrick's lawyer. The fact that Patrick was forcefully restrained before he could assault Charles hardly eliminates the relevance of the earlier incident in suggesting the likelihood of future harm. Moreover, the court heard testimony of threats and confrontational behavior by Patrick

on other occasions that admitted of a similar inference.[9] (See generally *R.D. v. P.M.*, *supra*, 202 Cal.App.4th at pp. 189–190 [court may "consider any evidence showing a likelihood of future harassment, including evidence of conduct that might not itself constitute harassment"].)

Nor is the fact that some or all members of the Gossage family acted as though they were not in fear somehow inconsistent with the conclusion that there was a risk of additional violence. These are two separate inquiries. How the Gossages were affected by Patrick's confrontational conduct—whether they were subjectively afraid of him—has no bearing on whether Patrick was likely to engage in additional harassment of his neighbors within the meaning of section 527.6.

In short, there was substantial evidence both that Patrick physically assaulted Charles and that, absent issuance of a CHRO, the Gossage family

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9 Relying on *Scripps*, *supra*, 72 Cal.App.4th 324 and *Russell*, *supra*, 112 Cal.App.4th 399, Patrick suggests there was no risk of future harm because Charles testified he had moved his family out of the neighborhood. The testimony merely reflected that the Gossages had moved *temporarily*, and Charles specifically indicated they intended to return in the near future. It did not demonstrate there was no potential for future violence. We also deny Patrick's request for judicial notice of documents showing how the parties *later* resolved their easement dispute. (See, e.g., *Jordache Enterprises*, *Inc. v. Brobeck*, *Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [denying judicial notice of materials not "necessary, helpful, or relevant" to appeal].) While those materials might be significant in a subsequent motion to modify or dissolve the CHRO, they do not bear on the correctness of the order when issued.

was at risk of future harm. This conclusion likewise disposes of Patrick's objection to the award of prevailing party attorney's fees to Charles.[10]

DISPOSITION

The judgment is affirmed. Respondent is entitled to his costs and attorney's fees on appeal, in an amount to be determined by the trial court. (See *Byers v. Cathcart* (1997) 57 Cal.App.4th 805, 813.)

DATO, J.

WE CONCUR:

HALLER, Acting P. J.

AARON, J.

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10 Patrick argues the court erred in failing to award attorney's fees to his wife Candyce and son Jack, as to whom the court denied Charles's requests for CHROs. But such a claim would need to be asserted in separate appeals by Candyce and Jack; it is not cognizable in an appeal filed solely by *Patrick*.